

Volume 1  
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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
BEFORE THE HONORABLE JEFFREY S. WHITE, JUDGE

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	NO. CR CR 10-245 JSW
	)	
KENNETH MARTIN KYLE,	)	
	)	San Francisco, California
Defendant.	)	Thursday,
	)	March 8, 2012
	)	2:17 p.m.

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Plaintiff: MELINDA L. HAAG  
United States Attorney  
450 Golden Gate Ave.  
San Francisco, California 94102  
BY: OWEN PETER MARTIKAN  
Assistant United States Attorney

For Defendant: DAVID MICHAEL BIGELEISEN LAW OFFICE  
101 Howard Street  
Suite 310  
San Francisco, California 94105  
BY: DAVID MICHAEL BIGELEISEN, ESQ.

Also Present: CHARLES MABIE, U.S. PROBATION

Reported by BELLE BALL, CSR 8785, RMR, CRR  
Official Reporter, U.S. District Court

1 **THURSDAY, MARCH 8, 2012**

**2:17 P.M.**

2 **P R O C E E D I N G S**

3 **THE CLERK:** Calling Criminal Case No. 10-245, United  
4 States of America versus Kenneth Martin Kyle.

5 **MR. MARTIKAN:** Good afternoon, Your Honor. Owen  
6 Martikan for the United States.

7 **THE COURT:** Good afternoon.

8 **MR. BIGELEISEN:** Good afternoon, Your Honor. David  
9 Michael Bigeleisen for Mr. Kyle.

10 **THE COURT:** Good afternoon.

11 (Reporter interruption)

12 **MR. MABIE:** And Charlie Mabie, U.S. Probation.

13 **THE COURT:** Welcome, sir.

14 I'm advised that the Defendant is on a different  
15 floor, so it might be a couple of minutes.

16 (A pause in the proceedings)

17 (Defendant present)

18 **THE COURT:** All right, Mr. Kyle has arrived.

19 Good afternoon, Mr. Kyle.

20 Good afternoon, Mr. Kyle.

21 **THE DEFENDANT:** Good afternoon.

22 **THE COURT:** All right. So, just to kind of review  
23 where we are, the Defendant previously entered a guilty plea  
24 pursuant to an 11(c)(1)(C) plea agreement. And, the Court  
25 ordered a presentence report.

1           And upon receiving the presentence report, the Court  
2 told the Defendant -- notified the Defendant and counsel that  
3 it was rejecting the agreement, and the amount agreed to. The  
4 parties had agreed to a sentence of 30 years. 360 months. The  
5 Court felt that was too lenient, and ordered that the case go  
6 to trial, essentially.

7           I have been advised by a letter and a proposed plea  
8 agreement -- by a letter from the Government that a new and  
9 different plea agreement was reached, with a different -- a  
10 different disposition agreed to by the parties. And, the --  
11 another (c)(1)(C) plea agreement.

12           And, I will say that based upon this letter, which is  
13 dated February 14th, 2012, which -- may I assume, is it  
14 correct, Mr. Bigeleisen, that you received a copy of the  
15 letter?

16           **MR. BIGELEISEN:** Yes, of course, Your Honor.

17           **THE COURT:** And, have gone over that with Mr. Kyle?

18           **MR. BIGELEISEN:** Yes, yes.

19           **THE COURT:** All right. And, I think the Government  
20 makes a persuasive argument as to why the Court should accept  
21 the new plea agreement. And, I'm inclined to do so at this  
22 point.

23           I won't do it until after I have, obviously, queried  
24 the Defendant about the new plea agreement.

25           So, first things first. Has the Defendant executed

1 the new agreement?

2 **MR. BIGELEISEN:** Yes.

3 **THE COURT:** Okay. Would you hand it up to the Court,  
4 please.

5 **MR. MARTIKAN:** Well, I -- I think that -- that's the  
6 one Your Honor has. I have another copy which --

7 **MR. BIGELEISEN:** I have only one copy, Your Honor.

8 **MR. MARTIKAN:** Let me -- let's reexecute the whole  
9 thing.

10 **MR. BIGELEISEN:** Okay.

11 (Document signed)

12 (Document handed up to the Court)

13 **THE COURT:** So, I have the executed plea agreement.

14 It would be the Court's view, and inclination, to --  
15 that it -- not to have a completely full-blown -- a  
16 reexamination of the Defendant under Rule 11, because we did a  
17 very extensive colloquy the last time. We'd go with some other  
18 matters, especially with respect to the new agreement.

19 But, I would like to hear what -- what's the  
20 Government's view on that? Is the Court required to do a  
21 complete superseding plea colloquy?

22 **MR. MARTIKAN:** Your Honor, I know this was done  
23 very -- in great detail last time. I think the Court should go  
24 over essentially the whole plea colloquy, to make sure there's  
25 an explicit waiver of rights.

1 I think there may be some issues we perhaps can go  
2 over in a little less detail. But I -- I think I would  
3 actually ask that we go over the whole waiver of rights.

4 **THE COURT:** What is your view, Mr. Bigeleisen?

5 **MR. BIGELEISEN:** I think that would be the right  
6 thing to do, Your Honor.

7 **THE COURT:** All right, then that's what we will do.  
8 All right. Would you please swear the Defendant?  
9 (Defendant placed under oath)

10 **THE COURT:** All right. So, you understand, sir, that  
11 you are under oath?

12 **THE DEFENDANT:** Yes, sir.

13 **THE COURT:** All right. Would you speak into the  
14 microphone?

15 **THE DEFENDANT:** Yes, sir.

16 **THE COURT:** Okay. And so, you must tell the truth.  
17 Do you understand?

18 **THE DEFENDANT:** Yes, sir.

19 **THE COURT:** And if you lie to the Court, you could  
20 receive additional penalties.

21 **THE DEFENDANT:** Yes, sir.

22 **THE COURT:** I'm going to ask you some questions about  
23 the -- to make sure you knowingly and voluntarily and  
24 intelligently, with the advice of your attorney, want to enter  
25 a guilty plea. And I'm going to ask you some questions about

1 the crime you are pleading guilty to, and you will be required  
2 to answer those questions.

3 **THE DEFENDANT:** Yes, sir.

4 **THE COURT:** And, any time you need or want to talk to  
5 Mr. Bigeleisen, please do so. If you don't understand any  
6 question that I ask you, let me know, and I'll rephrase it.

7 **MR. BIGELEISEN:** Your Honor, may I please have just a  
8 moment with Mr. Kyle before we proceed?

9 **THE COURT:** Sure.

10 (Off-the-Record discussion between Defendant and  
11 Counsel)

12 **MR. BIGELEISEN:** Thank you very much, Your Honor.

13 **THE COURT:** What's your full name?

14 **THE DEFENDANT:** Kenneth Martin Kyle.

15 **THE COURT:** How old are you?

16 **THE DEFENDANT:** I'm 47.

17 **THE COURT:** How far did you go in school?

18 **THE DEFENDANT:** Ph.D.

19 **THE COURT:** In what subject?

20 **THE DEFENDANT:** I'm sorry?

21 **THE COURT:** In what subject did you get your Ph.D.?

22 **THE DEFENDANT:** Justice studies.

23 **THE COURT:** Justice studies. Where was that?

24 **THE DEFENDANT:** Arizona State University.

25 **THE COURT:** So, I assume you can read and write

1 English, correct?

2           **THE DEFENDANT:** Yes, sir.

3           **THE COURT:** And, before coming to court today, have  
4 you had any medications or drugs?

5           **THE DEFENDANT:** My normal.

6           **THE COURT:** Well --

7           **THE DEFENDANT:** My normal medications. Nothing above  
8 and beyond.

9           **THE COURT:** Nothing that would prevent you from  
10 understanding what's going on?

11           **THE DEFENDANT:** That's correct, Your Honor.

12           **THE COURT:** Have you been treated recently for any  
13 mental illness or addiction to narcotic drugs?

14           **THE DEFENDANT:** I'm having mental-health counseling,  
15 but it's nothing that's going to preclude me from making a  
16 sound judgment.

17           **THE COURT:** All right. And, you agree with that,  
18 Mr. Bigeleisen?

19           **MR. BIGELEISEN:** I believe so. He's being treated  
20 for depression, Your Honor.

21           **THE COURT:** All right. Are you sick in any way?

22           **THE DEFENDANT:** No, Your Honor.

23           **THE COURT:** What do you think is happening here  
24 today?

25           **THE DEFENDANT:** I am going to be going through a plea

1 agreement that we've negotiated, and I will acknowledge that in  
2 fact I've agreed to it, of my own free will.

3 **THE COURT:** I'm sorry?

4 **THE DEFENDANT:** Of my own free will.

5 **THE COURT:** And, you understand that you're offering  
6 another guilty plea, because I allowed to you withdraw the  
7 previous one?

8 **THE DEFENDANT:** Yes, sir.

9 **THE COURT:** All right. If you don't -- if you  
10 continue to enter a not-guilty plea, which you are allowed to  
11 do, you would have the right to a jury.

12 Do you understand that?

13 **THE DEFENDANT:** I understand.

14 **THE COURT:** And, that would be a jury consisting of  
15 12 citizens of this district?

16 **THE DEFENDANT:** I understand.

17 **THE COURT:** And their decision would have to be  
18 unanimous before they can convict you?

19 **THE DEFENDANT:** I understand.

20 **THE COURT:** And you would have the right to counsel  
21 at this trial. And if you couldn't afford one, the Court would  
22 appoint one, and the government would pay for that attorney.

23 **THE DEFENDANT:** I understand.

24 **THE COURT:** And you understand you have a right to  
25 waive counsel.



1           **THE DEFENDANT:** Yes, Your Honor.

2           **THE COURT:** And you have a right to represent  
3 yourself.

4           **THE DEFENDANT:** I understand.

5           **THE COURT:** And at this trial, you would be presumed  
6 innocent, and the burden would be on the Government to prove  
7 your guilt beyond a reasonable doubt.

8           Do you understand?

9           **THE DEFENDANT:** Yes, sir.

10          **THE COURT:** And the Government would have to call  
11 witnesses in order to convict you, and to prove their case  
12 beyond a reasonable doubt, they would have to call witnesses to  
13 this court.

14          Do you understand?

15          **THE DEFENDANT:** I understand.

16          **THE COURT:** And you understand you have a right to  
17 see those witnesses, and confront them, and cross-examine them.

18          Do you understand that?

19          **THE DEFENDANT:** Yes, I do.

20          **THE COURT:** And you also have a right to remain  
21 silent during the trial, which means that you don't have to do  
22 anything during the trial.

23          Do you understand?

24          **THE DEFENDANT:** I understand.

25          **THE COURT:** And do you understand, nobody can comment

1 on your failure to say or do anything?

2 **THE DEFENDANT:** Yes, sir. I understand.

3 **THE COURT:** And the fact that you chose to exercise  
4 this right, again, would never be held against you. You  
5 understand that.

6 **THE DEFENDANT:** I understand.

7 **THE COURT:** But, on the other hand, after consulting  
8 with your lawyer, you may decide that you do call witnesses,  
9 yourself or other witnesses, or any -- any evidence or any  
10 witness allowed by law.

11 Do you understand that?

12 **THE DEFENDANT:** Yes, sir.

13 **THE COURT:** And if you had witnesses or evidence that  
14 were not available to you, you could use the subpoena powers of  
15 the Court to compel those witnesses to come here.

16 Do you understand that?

17 **THE DEFENDANT:** I understand that, sir.

18 **THE COURT:** But the -- the facts and the rights that  
19 I've told you about would never change the burden of proof at  
20 trial.

21 Do you understand that the Government always bears  
22 the burden of proving your guilt on each of the charges brought  
23 against you?

24 **THE DEFENDANT:** Yes, Your Honor.

25 **THE COURT:** And you understand that by entering a

1 guilty plea, you give up your right to have a trial?

2           **THE DEFENDANT:** Yes, Your Honor.

3           **THE COURT:** And you are convicting yourself by your  
4 guilty plea today.

5           **THE DEFENDANT:** Yes, Your Honor.

6           **THE COURT:** And you understand there will be no  
7 trial, in fact, if I accept your guilty plea.

8           **THE DEFENDANT:** Yes, Your Honor.

9           **THE COURT:** Now, has anyone threatened you in any way  
10 in order to enter a guilty plea?

11           **THE DEFENDANT:** No, Your Honor.

12           **THE COURT:** Are you pleading guilty to protect  
13 anyone?

14           **THE DEFENDANT:** No, Your Honor.

15           **THE COURT:** Has anyone promised you anything, other  
16 than in this plea agreement that's been presented to the Court?

17           **THE DEFENDANT:** No, sir.

18           **THE COURT:** Are you pleading guilty of your own free  
19 will, because you are, in fact, guilty?

20           **THE DEFENDANT:** Yes, Your Honor.

21           **THE COURT:** Now, did you have an opportunity to go  
22 over this plea agreement with your attorney?

23           **THE DEFENDANT:** Yes, I did.

24           **THE COURT:** Now, in this plea agreement -- I'm going  
25 to summarize this briefly, because you've read it, and you're a

1 smart guy. You've got a Ph.D. But, this is a legal document,  
2 and I want to make sure you understand it.

3 So, in this new plea agreement, you agree to plead  
4 guilty to Count 1 of the indictment, which charges you  
5 aggravated sexual abuse with children, in violation of 18  
6 U.S.C. § 2241(c)(1). And, we'll get into the elements which  
7 you acknowledge in this case.

8 And, you acknowledge your understanding of the  
9 maximum sentence which the Court may impose, which is a prison  
10 sentence of a minimum of 30 years, maximum of life; and a  
11 maximum fine of \$250,000; a supervised release term of a  
12 minimum of five years and a maximum of life; a mandatory  
13 special assessment of \$100; and restitution to be determined by  
14 the Court. And, registration as a sex offender.

15 You acknowledge your guilt in the case, and certain  
16 facts that prove your guilt. And, we'll get into those in a  
17 moment.

18 You agree to give up all the rights that you would  
19 have as this case went to trial. They're all listed in here.

20 Did you go over those with your attorney?

21 **THE DEFENDANT:** Yes, we did.

22 **THE COURT:** And, you understand all of those rights?

23 **THE DEFENDANT:** Yes, sir.

24 **THE COURT:** And, you give up your right to appeal any  
25 aspect of your sentence or your conviction.

1           **THE DEFENDANT:** I understand, yes.

2           **THE COURT:** And you give up your right to bring a  
3 separate appeal to this Court on any ground other than that  
4 your right to the effective assistance of counsel was violated.

5           Do you understand that?

6           **THE DEFENDANT:** Yes, Your Honor.

7           **THE COURT:** And you agree not to ask the Court to  
8 withdraw your guilty plea at any time after it's entered,  
9 unless the Court refuses -- declines to accept the sentence  
10 agreed to by the parties.

11           You agree the Government may withdraw from the  
12 agreement if the Court does not accept the sentence set forth  
13 in this case, or in this plea agreement.

14           And you agree that if the Court -- you further agree  
15 to not ask the Court for any continuance of your sentence. If  
16 I accept your plea agreement, you'll be sentenced today. So,  
17 that's not really an issue.

18           You agree that your sentence should be calculated  
19 under the sentencing guidelines, which are not binding on this  
20 Court, and under the sentencing statute in such a way that your  
21 adjusted offense level is 41.

22           And you understand -- is there an understanding --  
23 there's been a calculation as to the guideline -- the criminal  
24 history category. Is that correct?

25           **MR. MARTIKAN:** Yes, Your Honor. It's not agreed, but

1 it was calculated in the presentence report, and the parties  
2 did not object to that.

3 **THE COURT:** Which is a 1.

4 **MR. MARTIKAN:** Which is a 1, yes, sir.

5 **THE COURT:** So, a Level 41 at Criminal History  
6 Category 1, the Defendant would be -- the guideline sentence  
7 would be 324 to 405 months.

8 Has your lawyer explained that that's the guideline  
9 exposure?

10 **THE DEFENDANT:** Yes, Your Honor.

11 **PROBATION OFFICER MABIE:** Um --

12 **THE COURT:** And, you agree that a reasonable and  
13 appropriate disposition of this case -- meaning the sentence --  
14 under the guidelines and under the sentencing statute, which is  
15 called 18 U.S.C. 3553(a), is as follows: A sentence of no less  
16 than 405 months but no longer than 450 months imprisonment; ten  
17 years of supervised release with conditions to be fixed by the  
18 Court; a \$100 special assessment; and a \$50,000 restitution.

19 Is that your agreement with the Government?

20 **THE DEFENDANT:** Yes, it is.

21 **THE COURT:** All right. You agree to forfeit certain  
22 items that are listed in the plea agreement, and not to contest  
23 the forfeiture of those, which are alleged to be  
24 instrumentalities used in committing the crime that you are  
25 admitting to today.

1 And, you agree that this agreement contains all of  
2 the promises and agreements between you and the Government, and  
3 you will not claim otherwise in the future.

4 That this agreement binds only the U.S. Attorney's  
5 office for the Northern District of California and the Eastern  
6 District of Missouri, and does not bind any other federal,  
7 state, or local agency.

8 Now, the Government has made certain promises to you.  
9 They agree to move to dismiss any open charges against the  
10 Defendant, in the indictment, at the time of sentencing.

11 The Eastern District of Missouri agrees to dismiss  
12 the pending charges against you in *U.S. v. Kyle*, the cases  
13 listed there in the Eastern District of Missouri, after your  
14 sentence.

15 Am I correct, Mr. Martikan, there's no agreement with  
16 respect to the state charges?

17 **MR. MARTIKAN:** That's correct, Your Honor.

18 **THE COURT:** And, you understood that?

19 **THE DEFENDANT:** Yes, sir.

20 **THE COURT:** All right. And, the Government agrees  
21 not to file any additional charges against you that could have  
22 been filed as a result of the investigation in this case.

23 They further agree that the sentence I summarized  
24 before is what they -- what their -- is reasonable and  
25 appropriate.

1 And, they agree to recommend that the term of  
2 imprisonment run concurrently with any sentence imposed on you  
3 arising out of the currently-pending state charges in  
4 St. Louis.

5 And, that's the state case, correct?

6 **MR. MARTIKAN:** Correct.

7 **THE COURT:** All right. And, you understood that?

8 **THE DEFENDANT:** Yes, Your Honor.

9 **THE COURT:** And, you've confirmed that you understand  
10 this agreement, and have entered into it freely and  
11 voluntarily. And, that your conviction under this agreement  
12 will require you to register as a sex offender.

13 Have I adequately summarized -- or accurately  
14 summarized the agreement, sir?

15 **THE DEFENDANT:** Yes, Your Honor. Can I ask real  
16 quick, one moment, my --

17 **THE COURT:** Any time you want.

18 (Off-the-Record discussion between Defendant and  
19 Counsel)

20 **THE DEFENDANT:** Very good, Your Honor.

21 **THE COURT:** All right. Now, has anyone made any  
22 other promises to you outside of this agreement?

23 (Off-the-Record discussion between Defendant and  
24 Counsel)

25 **THE DEFENDANT:** No, Your Honor.



1           **THE COURT:** All right. Any doubt about that?  
2 Because if there are, I don't know about them. And, I'm not  
3 bound by them.

4           **THE DEFENDANT:** No, Your Honor.

5           **THE COURT:** All right. Now, Mr. Bigeleisen, I'm  
6 going to ask you some questions about the agreement.

7           Does your signature appear on Page 6?

8           **MR. BIGELEISEN:** Yes, it is, Your Honor.

9           **THE COURT:** Have you discussed this agreement  
10 thoroughly and completely with Mr. Kyle, including the  
11 provision for waiver of appeal?

12           **MR. BIGELEISEN:** Yes.

13           **THE COURT:** Have you answered all of his questions  
14 about the plea agreement?

15           **MR. BIGELEISEN:** I believe I have.

16           **THE COURT:** All right. In your opinion, does  
17 Mr. Kyle understand the agreement completely, including the  
18 provision for waiver of appeal?

19           **MR. BIGELEISEN:** Yes.

20           **THE COURT:** Do you agree with those answers?

21           **THE DEFENDANT:** Yes, Your Honor.

22           **THE COURT:** Now, you understand that you're pleading  
23 guilty to a felony, and therefore, you will be deprived of  
24 certain civil rights relating to the possession of firearms?

25           **THE DEFENDANT:** Yes.

1           **THE COURT:** And you may be deprived of other rights,  
2 such as the right to vote, hold public office, or serve on a  
3 jury?

4           **THE DEFENDANT:** I understand.

5           **THE COURT:** Now, you understand I have a right to  
6 reject this plea agreement, and impose -- and allow you to go  
7 to trial.

8           Do you understand that?

9           **THE DEFENDANT:** I understand, sir.

10          **THE COURT:** And I will let you, as I did before,  
11 withdraw your guilty plea.

12          **THE DEFENDANT:** I understand.

13          **THE COURT:** All right. Now, have you and  
14 Mr. Bigeleisen talked about how the guidelines might apply to  
15 your case?

16          **THE DEFENDANT:** I'm sorry --

17          **THE COURT:** Have you and Mr. Bigeleisen talked about  
18 how the guidelines might apply to your case?

19          **THE DEFENDANT:** Yes, we have, Your Honor.

20          **THE COURT:** Do you understand that the sentence, the  
21 -- any sentence imposed may be different from any estimate that  
22 your lawyer may have given to you, ultimately?

23          Do you understand that?

24          (Off-the-Record discussion between Defendant and  
25 Counsel)

1           **THE COURT:** Well, what it means is let's say I reject  
2 the plea agreement, and let's say you go to trial, or you  
3 negotiate a different agreement that is not binding on the  
4 Court. Ultimately, the Court may give you a higher sentence.

5           Do you understand that?

6           **THE DEFENDANT:** Right, but the agreement we have here  
7 (Indicating) restricts the Court, correct?

8           **THE COURT:** If I accept the agreement.

9           **THE DEFENDANT:** If you accept it. Yes, Your Honor.  
10 I understand.

11          **THE COURT:** If I don't accept it, then --

12          **THE DEFENDANT:** Right.

13          **THE COURT:** -- the statute is the limit.

14          **THE DEFENDANT:** I understand.

15          **THE COURT:** All right. And, do you understand that  
16 under our system, parole has been abolished, and if you're  
17 sentenced to prison, you will not be released on parole?

18          **THE DEFENDANT:** I understand, Your Honor.

19          **THE COURT:** All right. Have you received a copy of  
20 the indictment in this case that you are pleading guilty to?

21          **THE DEFENDANT:** Yes, Your Honor.

22          **THE COURT:** Do you understand what you are charged  
23 with?

24          **THE DEFENDANT:** Yes, Your Honor.

25          **THE COURT:** Tell me in your own words what you think

1 you are charged with.

2 **THE DEFENDANT:** I'm -- in August of 2009 --

3 **THE COURT:** I'm just asking -- not the facts, but  
4 charges.

5 **THE DEFENDANT:** Oh, I'm sorry. Yes, Your Honor. I  
6 have been accused of going to Missouri, engaging in a lewd act  
7 with a child.

8 **THE COURT:** All right. Mr. Martikan, would you  
9 please present the elements of the charged offense.

10 **MR. MARTIKAN:** Thank you, Your Honor.

11 The elements of a violation of Title 18 United States  
12 Code § 2241(c), Aggravated Sexual Abuse with Children, are that  
13 the Defendant knowingly crossed a state line, the first  
14 element, and two, with the intent to engage in a sexual act  
15 with a person who had not attained the age of 12.

16 **THE COURT:** All right. And, do you understand that  
17 the maximum penalty that can be imposed under the statute are  
18 the ones that I summarized; include up to life imprisonment?

19 **THE DEFENDANT:** Yes, Your Honor.

20 **THE COURT:** And, do you understand that the Court is  
21 also required to order you to make restitution to any victim  
22 who may have sustained a loss, unless the Court gives specific  
23 reason not to do so?

24 **THE DEFENDANT:** I understand.

25 **THE COURT:** And I take it, since the Government has

1 received letters from the representatives of the victim and  
2 therapist of the victim, that the Government has done its duty  
3 under the Victim Rights Act.

4 **MR. MARTIKAN:** That's correct, Your Honor.

5 **THE COURT:** All right. And, do you understand that  
6 if the Court sentences you to conditions of supervised release,  
7 and you violate any of those, you can get additional time in  
8 jail?

9 **THE DEFENDANT:** I understand, Your Honor.

10 **THE COURT:** So, do you understand all of the  
11 consequences of your plea?

12 **THE DEFENDANT:** Yes, Your Honor.

13 **THE COURT:** Now, because we don't want anybody  
14 pleading guilty who's not guilty, and who doesn't believe  
15 they're guilty, I want to ask you: Did you commit the crime  
16 you're pleading guilty to?

17 **THE DEFENDANT:** Yes, Your Honor.

18 **THE COURT:** Tell me what you did that makes you  
19 guilty.

20 **THE DEFENDANT:** I arranged a flight to Missouri from  
21 here. I went to Missouri with the intention of performing a  
22 lewd act with a child. And, in fact, I did.

23 **THE COURT:** So, you raped an infant, didn't you? And  
24 you made movies out of it.

25 **MR. BIGELEISEN:** Your Honor --

1           **THE COURT:** Did you do that, or not?

2           **MR. BIGELEISEN:** Your Honor, I don't think that those  
3 -- those --

4           **THE COURT:** I want to know what he did.

5           **MR. BIGELEISEN:** I understand.

6           **THE COURT:** Did you rape an infant?

7           (Off-the-Record discussion between Defendant and  
8 Counsel)

9           **THE DEFENDANT:** I don't --

10          (Off-the-Record discussion between Defendant and  
11 Counsel)

12          **MR. BIGELEISEN:** Your Honor, may I speak for  
13 Mr. Kyle, please?

14          **THE COURT:** You may, for the moment, but I'm going to  
15 want to hear from him or I'm not accepting his plea.

16          **MR. BIGELEISEN:** I understand, but I want --

17          **THE COURT:** I don't want this sugar-coated. I want  
18 the Record to show exactly what this man did.

19          **MR. BIGELEISEN:** Right. Your Honor, I don't think  
20 the word "rape" accurately describes what he did.

21          **THE COURT:** So, you're saying the infant consented to  
22 being sexually assaulted?

23          **MR. BIGELEISEN:** No. I do not say that. But, I'm  
24 saying that the act that he did I do not believe is described  
25 as an act of rape. But, he may describe the act.

1           **THE COURT:** Describe the act.

2           **THE DEFENDANT:** Um, God. Um, the child -- sorry,  
3 Your Honor. The child's mouth was on my penis. And, and I  
4 ejaculated on the child's stomach.

5           **THE COURT:** All right. And you traveled to Kansas to  
6 do this?

7           **THE DEFENDANT:** To Missouri, sir.

8           **THE COURT:** Missouri. Okay. All right.

9           All right. I'm now going to ask the Government to  
10 indicate what it would prove beyond a reasonable doubt, because  
11 even though you've admitted to facts that would make you  
12 guilty, you're not guilty unless they can prove it.

13           So, I want you to hear one last time what the  
14 Government can prove, beyond a reasonable doubt.

15           **MR. MARTIKAN:** Thank Your Honor.

16           If this case were to go to trial, the Government  
17 would be able to prove beyond a reasonable doubt that in  
18 August, 2009, and on several other occasions that year, the  
19 Defendant traveled from San Francisco to St. Louis, Missouri,  
20 and crossed the state line in doing so, and did so with the  
21 intention of engaging in a sexual act with a minor whom he knew  
22 was younger than 12. In fact, an infant.

23           And that he, in fact, did engage in sexual --

24           **THE COURT:** How old was the child?

25           **MR. MARTIKAN:** -- acts. During -- in August, 2009,

1 the child would have been five months old, Your Honor.

2 **THE COURT:** All right.

3 **MR. MARTIKAN:** So, at least on that occasion, did  
4 engage in a sexual act with a child who was approximately five  
5 months old.

6 **THE COURT:** All right. Anything else?

7 **MR. MARTIKAN:** No, Your Honor.

8 **THE COURT:** All right. You heard what the Government  
9 said it can prove if the case went to trial, did you?

10 **THE DEFENDANT:** Yes, I did.

11 **THE COURT:** Are those facts true and substantially  
12 correct?

13 **THE DEFENDANT:** Substantially correct, yes, sir.

14 **THE COURT:** All right. Are you pleading guilty  
15 because you are, in fact, guilty of the offense?

16 **THE DEFENDANT:** Yes, Your Honor.

17 **THE COURT:** Now, you have been represented by  
18 Mr. Bigeleisen, is that correct?

19 **THE DEFENDANT:** That's correct.

20 **THE COURT:** And, has he provided you with all of the  
21 legal advice that you have needed or wanted?

22 **THE DEFENDANT:** Yes, Your Honor.

23 **THE COURT:** And, are you satisfied with your legal  
24 representation by Mr. Bigeleisen?

25 **THE DEFENDANT:** Yes, Your Honor.



1           **THE COURT:** All right. Do you need to obtain any  
2 further advice from him at this point?

3           **THE DEFENDANT:** I don't believe so.

4           **THE COURT:** All right. So, with all of the  
5 consequences of pleading guilty in mind, how do you plead to  
6 Count One of the indictment, which charges you with aggravated  
7 sexual abuse with children, in violation of 18 U.S.C.  
8 § 2241(c)? Guilty, or not guilty?

9           **THE DEFENDANT:** Guilty, Your Honor.

10          **THE COURT:** All right. The Court accepts the  
11 Defendant's plea, finding that the Defendant has knowingly and  
12 voluntarily and intelligently, with the advice of his attorney,  
13 entered a guilty plea.

14          The Court further finds that the elements required to  
15 support a conviction under the charged statute have been  
16 satisfied.

17          The Court further finds that there is a sufficient  
18 factual basis to support the plea.

19          Therefore, the Court accepts the guilty plea, and  
20 also thereby does accept the plea agreement, and agrees to  
21 sentence the Defendant in accordance with it.

22          Although -- although it's a close question, and the  
23 Court does so reluctantly, I think the Government makes a very  
24 persuasive case about why the sentence is appropriate, all  
25 things considered, and especially considering the victim in

1 this case.

2 So, I do accept the plea agreement, and I will  
3 sentence the Defendant in accordance with that.

4 Is there anything -- there's an issue of range. The  
5 parties have agreed to a range.

6 What does the Government have to say about  
7 sentencing?

8 **MR. MARTIKAN:** Your Honor, in a general manner, the  
9 Government will submit.

10 I think a range -- a sentence within the range is  
11 clearly reasonable. I think a sentence in the middle that  
12 range is a reasonable sentence, although any sentence would be  
13 reasonable within that range.

14 **THE COURT:** All right. Mr. Bigeleisen, anything you  
15 would like to say at this point?

16 **MR. BIGELEISEN:** Yes. I would like to begin by  
17 saying that Mr. Kyle's almost 48 right now. And, if the Court  
18 sentences Mr. Kyle to the low end of the range, he will be an  
19 old man when he's released from prison. If the Court sentences  
20 him to anything more than that, he will still be an old man.

21 The indication that we have is that he may very well  
22 not live that long. That having been said, Mr. Kyle is  
23 affording the grace to the Court, to the Government, and  
24 particularly to the child, by deciding to plead guilty rather  
25 than to proceed to trial.

1           And, one of the graces that he's providing is not  
2 making a record of the conduct. And I think that that is  
3 important to the child because as she grows up, she need not be  
4 informed, unless she wishes to be, of that which has  
5 transpired.

6           We are now looking forward. And I -- and this, I  
7 want to share with the Court, is something that Mr. Kyle  
8 presented to me. This is not my authorship. It's Mr. Kyle's  
9 authorship. And that, I think, is important.

10           That having been said, the low end of the range also  
11 reflects the very highest end of the sentencing guidelines.  
12 And the sentencing guidelines, of course, reflect all of the  
13 considerations which the Court considers in the sentencing  
14 statute.

15           The Court did express some opinions earlier in this  
16 case about what its sentiments were. And the range that has  
17 been presented to you takes those things into account.

18           It is very difficult to imagine that Mr. Kyle will  
19 encounter this child again during the lifetime of any of the  
20 people who are here in this courtroom. And so, I don't think  
21 that that is a present danger.

22           In addition to that, shortly before Mr. Kyle's  
23 release from the federal penitentiary, he will be examined  
24 under the Adam Walsh Act. And if it's determined that he  
25 presents a public menace at that time, then he will still be

1 confined. So, I think that those are things which the Court  
2 should consider.

3 The Court also has Dr. McAndrews' report. And we  
4 presented that to you, because I think all of us have wondered:  
5 What is it that is within Mr. Kyle, and what is it that has  
6 brought him to be before you in this way? And, it's not  
7 offered as an excuse, but an explanation. And I think that  
8 that helps all of us.

9 That having been said, nobody here says that the  
10 Court's rebuke in this case is not appropriate. This certainly  
11 does call for rebuke. It calls for a strong rebuke.

12 The statutory minimum of 30 years is a strong rebuke.  
13 The 405 months, which is the bottom end of the plea agreement  
14 and the top end of the guideline, is also a strong rebuke.

15 And with that, we ask the Court not to look to the  
16 high end of what has been agreed upon, but to consider all of  
17 these things, and to view this either at the low end of the  
18 range or the middle.

19 **THE COURT:** All right. Mr. Kyle, this is your  
20 opportunity to address the Court.

21 **THE DEFENDANT:** Your Honor, I would acknowledge what  
22 I've done. What I did was wrong, Your Honor; I know it. I'm  
23 -- I'm ashamed. I offer no excuses.

24 I want to apologize to everyone who's had the  
25 misfortune of learning what I've done. It's a really negative

1 dark shadow out in people's minds. And I would take it back if  
2 I could, but I can't.

3 I would like to apologize to my victim and to her  
4 family, if I could. And I would like to assure them that they  
5 did nothing to prompt me to act. I'm -- they are blameless.  
6 The acts were mine, and mine, alone.

7 I also want to apologize to my family, and to my  
8 friends, and ask their forgiveness for not having the strength  
9 of character to reach out for them and ask for their help and  
10 guidance before things went awry and I ended up where I am now.  
11 I've caused them shame and embarrassment, and it's not their  
12 fault, either. It is only my own.

13 I accept responsibility, and I'm ready to take my  
14 punishment, sir.

15 **THE COURT:** All right. Thank you, sir.

16 All right, so, the Court has this case for  
17 sentencing. Obviously, the parties have agreed to a sentence  
18 which certainly is -- would constitute -- could constitute a  
19 variance from the guideline, the nonbinding guideline range.  
20 And, the Court obviously starts with what the guidelines talk  
21 about.

22 The Court -- the salient factors under 3553(a) that  
23 the Court needs to consider in this case which I think run  
24 closely together are the nature and circumstances of the  
25 offense. The offense in this case is shocking beyond anything

1 that this Court has ever experienced in any aspect of its life,  
2 and is -- is an abomination. I just can't express strong  
3 enough how bad what you did is.

4 And although there are people who the Court sentences  
5 every day who had really difficult upbringings, and sometimes  
6 that's a justification for what they did, you were a college  
7 professor, a Ph.D. Somebody in a position of trust. A college  
8 professor in the Bay area.

9 And some of the things that are described in the  
10 presentence report, some of the other things that are involved  
11 as to which you haven't objected, some of the fantasies that  
12 you have had about doing things with babies, including killing  
13 them, those things which are not contested, and the pictures  
14 that you had on your computer when the computer was seized, and  
15 every -- and the quantity of pictures and all of that makes  
16 this one of the most shocking crimes that I can even imagine to  
17 be perpetrated on a helpless infant, who will suffer all of her  
18 life.

19 And, I did review the letters from her adoptive  
20 mother and from her therapist. And frankly, it made me sick.

21 And although there are factors in the guidelines --  
22 and one of the factors that the guidelines don't take into  
23 account is pure evil. And I think what you did is pure evil.  
24 And -- and I hope that you don't survive in prison.

25 And, the only reason I'm agreeing to the sentence

1 that's been agreed to by you and the Government is because of  
2 what the Government states, is sparing the child the trial that  
3 I originally ordered in this case, so that you could have a  
4 life sentence.

5 So, the sentence of this Court is as follows.

6 **MR. MARTIKAN:** Excuse me, Your Honor. Just, maybe  
7 it's a technicality, but it has substantive impact.

8 The Court did not actually explicitly find the  
9 offense level in the criminal history range. We all agreed  
10 that a --

11 **THE COURT:** Well, it's 41. I mentioned in the plea  
12 colloquy that it's 41, and a Criminal History Category of 1.

13 Correct?

14 **MR. MARTIKAN:** Yes.

15 **THE COURT:** Do you agree with that?

16 **MR. BIGELEISEN:** Yes, Your Honor.

17 Your Honor, I would also like to remark that --

18 **THE COURT:** We're not in the argument mode.

19 **MR. BIGELEISEN:** Oh, thank you.

20 **THE COURT:** The Government is correct that  
21 procedurally, if I had not already done so -- and I thought I  
22 had -- the Ninth Circuit requires that I state on the Record  
23 the correct calculation. And, I've done so.

24 Pursuant to the Sentencing Reform Act, it is the  
25 judgment of the Court that Kenneth Martin Kyle is hereby

1 committed to the custody of the Bureau of Prisons, to be  
2 imprisoned for a term of 450 months.

3           Upon release from imprisonment, the Defendant shall  
4 be placed on supervised release for a term of ten years.

5           Within 72 hours of release from the custody of the  
6 Bureau of Prisons, the Defendant shall report in person to the  
7 Probation Office in the district to which the Defendant is  
8 released.

9           And, the following specific conditions are imposed:

10           One, the Defendant shall submit to a search of his  
11 person, property, house, residence, vehicle, papers, computer,  
12 other electronic communication or data storage devices or  
13 media, and effects at any time, with or without a warrant, by  
14 any law enforcement or probation officer with reasonable  
15 suspicion concerning unlawful conduct or a violation of a  
16 condition of probation or supervised release.

17           Failure to submit to such a search may be grounds for  
18 revocation. The Defendant shall warn residents that the  
19 premises might be subject to search.

20           And, by the way, the sentence imposed by the Court is  
21 concurrent with any sentence issued by the state court pursuant  
22 to the plea agreement. The state court in Missouri.

23           Two, Defendant shall register with the state sex  
24 offender registration agency in any state where the Defendant  
25 resides, is employed, carries on a vocation, or is a student,



1 as directed by the Probation Officer.

2 The Defendant shall provide proof of registration to  
3 the Probation Officer within seven days of release from  
4 imprisonment.

5 Three, Defendant shall participate in a sex offender  
6 treatment program, as directed by the Probation Officer. The  
7 Defendant shall abide by all rules, requirements and conditions  
8 of such program, including, but not limited to, polygraph.

9 The Probation Officer shall disclose the presentence  
10 report and/or any previous mental health evaluations or reports  
11 to the treatment provider.

12 Four, Defendant shall not possess any materials  
13 including pictures, photographs, books, writings, drawings,  
14 videos or video games depicting and/or describing child  
15 pornography as defined in 18 United States Code § 2256(8).

16 Five, Defendant shall not contact the victim by any  
17 means, including in person, by mail or electronic means, or via  
18 third parties.

19 Further, Defendant shall remain at least 100 yards  
20 from the victim at all times. If any contact occurs, the  
21 Defendant shall immediately leave the area of contact, and  
22 report the contact to the Probation Officer.

23 Six, Defendant shall not associate or have any  
24 verbal, written, telephonic or electronic communication with  
25 any person under the age of 18, except, A, in the presence of

1 the parent or legal guardian of said minor, and B, on the  
2 condition that the Defendant notify said parent or legal  
3 guardian of his conviction in the instant offense or in the  
4 current offense.

5 This provision does not encompass persons under the  
6 age of 18 such as waiters, cashiers, ticket vendors, with whom  
7 the Defendant must deal with in order to obtain ordinary and  
8 usual commercial services.

9 Defendant shall not possess or use a computer or  
10 computer-related devices, including, but not limited to,  
11 personal computers, personal data systems, Internet appliances,  
12 electronic games, and cellular telephones, as well as their  
13 peripheral equipment, that can access or can be modified to  
14 access the Internet, electronic bulletin boards, and other  
15 computers or similar media with access to any online service at  
16 any location, including his place of employment.

17 This includes access through any Internet service  
18 provider, bulletin board system or any public or private  
19 computer network system.

20 Defendant shall not have another individual -- have  
21 another individual access the Internet on his behalf, to obtain  
22 files or information which he has been restricted from  
23 accessing, himself, or accept restricted files or information  
24 from any person.

25 Eight, Defendant shall not own or possess any

1 firearms, ammunition, destructive devices or other dangerous  
2 weapons.

3 Nine, the Defendant shall cooperate in the collection  
4 of DNA, as directed by the Probation Officer.

5 It is further ordered that the Defendant shall pay to  
6 the United States a special assessment of \$100, which shall be  
7 due immediately.

8 Payments of monetary payments -- monetary penalties  
9 are due during imprisonment at the rate of not less than  
10 \$25 per quarter. And, payment shall be through the Bureau of  
11 Prisons Inmate Financial Responsibility Program, at the address  
12 set forth in the presentence report recommendation.

13 It is further ordered that the Defendant shall pay  
14 restitution to the victim, via the adopted mother. And the  
15 name of the victim and adopted mother will be provided to the  
16 Clerk of the Court under separate cover, and the name shall be  
17 sealed. And, that \$50,000 shall be due immediately.

18 And during incarceration, the payment will be at a  
19 rate of not less than \$25 per quarter, and shall be through the  
20 same address and program as stated before.

21 As to forfeiture, the Defendant's interest in the  
22 listed property on Page 6 of the Probation Officer's  
23 recommendation, that property shall be forfeited to the United  
24 States.

25 Is there anything further from the Government?

1           **MR. MARTIKAN:** Your Honor, pursuant to the agreement,  
2 the Government moves to dismiss Counts 2, 4, 5, and 6 of the  
3 indictment.

4           **THE COURT:** Any objection?

5           **MR. BIGELEISEN:** No, of course not.

6           **THE COURT:** Anything further?

7           **MR. BIGELEISEN:** No, Your Honor.

8           **THE COURT:** All right. Well, the Court is going to  
9 recommend to the Bureau of Prisons that the Defendant serve his  
10 time in a maximum-security institution.

11           All right. Next case.

12           (Conclusion of Proceedings)

**CERTIFICATE OF REPORTER**

I, BELLE BALL, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing proceedings in CR 10-245 JSW, United States v. Kenneth Martin Kyle, were reported by me, a certified shorthand reporter, and were thereafter transcribed under my direction into typewriting; that the foregoing is a full, complete and true record of said proceedings as bound by me at the time of filing.

The validity of the reporter's certification of said transcript may be void upon disassembly and/or removal from the court file.

\_\_\_\_\_/s/ Belle Ball\_\_\_\_\_

Belle Ball, CSR 8785, RMR, CRR

Sunday, July 15, 2012